COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss.

Superior Court

SUPERIOR COURT
BARNSTABLE, SS
Filed DEC 05 2017
Scott W. Nickerson Clerk

COMMONWEALTH)
)
v.) No. 1995CR46579
)
EMORY G. SNELL, JR.,)
Defendant)

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR A NEW TRIAL

TABLE OF CONTENTS

-Specific criticisms of autopsy:

III. Argument:

This motion presents novel, substantial issues calling for an evidentiary hearing.

A
B
C
F
G
H
I
TABLE OF CONTENTS

III. Argument:

This motion presents novel, substantial issues calling for an evidentiary hearing.

A

B

C

TABLE OF CONTENTS

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court

COMMONWEALTH	)	
v.	)	No. 1995CR46579
EMORY G. SNELL, JR., Defendant	)	

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR A NEW TRIAL

Introduction

Emory Snell was indicted for the murder of his wife Elizabeth on April 19, 1995. Trial began on August 22, 1995, only 125 days later. He was convicted of first degree murder on September 1, 1995, and sentenced to life in prison. Represented by new, appointed counsel, he filed a motion for new trial, which was denied by the trial judge (Travers, J.) on February 9, 1998. On appeal from the denial of the new trial motion and of conviction, the Supreme Judicial Court affirmed. Commonwealth v. Snell, 428 Mass. 766 (1999).

Defendant Snell filed a pro se motion for new trial, supported by affidavit on December 20, 1999. The Court (Connon, J.) denied the motion on March 16, 2000. The Single Justice of

COMMONWEALTH OF MASSACHUSETTS

Barnstable, ss. Superior Court

COMMONWEALTH	
v.	No. 1995CR46579
EMORY G. SNELL, JR., Defendant	

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR A NEW TRIAL

Introduction

Emory Snell was indicted for the murder of his wife Elizabeth on April 19, 1995. Trial began on August 22, 1995, only 125 days later. He was convicted of first degree murder on September 1, 1995, and sentenced to life in prison. Represented by new, appointed counsel, he filed a motion for new trial, which was denied by the trial judge (Travers, J.) on February 9, 1998. On appeal from the denial of the new trial motion and of conviction, the Supreme Judicial Court affirmed. Commonwealth v. Snell, 428 Mass. 766 (1999).

Defendant Snell filed a pro se motion for new trial, supported by affidavit on December 20, 1999. The Court (Connon, J.) denied the motion on March 16, 2000. The Single Justice of

rior Court

the SJC denied leave to appeal by order docketed July 29, 2002.

Defendant, represented by new, retained counsel, filed a motion for post conviction written discovery, of the OCME files on his case, which was allowed on December 16, 2005. On September 13, 2012, defendant filed a motion to enlarge the 2005 discovery order to include the personnel file of Assistant Medical Examiner William Zane, M.D., who had testified to the cause of death. The Commonwealth filed an opposition. The motion was never acted on.

Next, defendant filed a Motion for a New Trial, supported by affidavit and memorandum of law, on December 12, 2012. Upon motion, the Court allowed the Motion for New Trial to be withdrawn on August 20, 2015. New, appointed counsel filed a motion for post-trial discovery under Mass.R.Crim.P. 30(c)(4). That motion and a motion to reconsider were denied in August 2015, without prejudice to filing a new discovery motion accompanied by a new Rule 30(b) motion.

Defendant Emory Snell has filed the accompanying Motion for a New Trial and Rule 30(c)(4) motion. The motions are supported by the affidavits and exhibits previously submitted with the 2012 New Trial Motion and the 2015 Rule 30(c)(4) Motion, and collected in the Appendix filed with the present motions. The Appendix also contains newly submitted affidavits

of Richard Shea, Joseph Krowski, Thomas Young, M.D., Michael Baden, M.D., Robert Lautzenheiser, and Belinda Souza.

Factual Background

The opinion of the Supreme Judicial Court summarized the evidence at trial. 428 Mass. at 768-770.

Circumstantial Evidence. The Commonwealth's circumstantial evidence of guilt was thin and would not, without more, support a finding of guilty of murder by Emory Snell, much less probable cause to indict. Defendant made no inculpatory statements, there were no percipient witnesses, and the decedent's bedroom and bed showed no signs of a struggle. The decisive issue at trial was whether Elizabeth Snell died from natural causes or from smothering. The only evidence heard on that subject was from Assistant Medical Examiner William Zane, M.D., who conducted the autopsy.

Dr. Zane gave the opinion that the cause of death was smothering. The present motion seeks a new trial, inter alia, with newly discovered evidence that the testimony of Dr. Zane was fatally flawed in ways not brought to the jury's attention; and that the Commonwealth suppressed exculpatory evidence. The motion also claims ineffective assistance of counsel in failure to rebut an eyewitness who claimed to have seen defendant drive

away from the home at 6:30 in the morning, a point within the range of estimated time of death testified to by Dr. Zane. It is also asserted that there was ineffective assistance of counsel in not replacing the pathologist, George Katsas, M.D., hired by the defense to consult before and during trial.

Autopsy Evidence. At the Grand Jury, Dr. Zane testified to his qualifications, including the statement, "I trained for one year at the office of the chief medical examiner in Baltimore, Maryland. At that point, I stayed on one year as a staff member." (Tr. 49) At trial, he testified that he "spen[t] a year in training in the office of the chief medical examiner in Baltimore, Maryland."[1] (Tr. 8/953)

At the Grand Jury, he also testified that he observed the back and front of the body on her bed in the home. He testified to observing a bruise on the ankle. He mentioned no other abrasions or cuts to the skin. He mentioned no injuries to the rear, including the head or neck. (App. B, pp. 50-55)

At trial, Dr. Zane testified that he first viewed the body of Elizabeth Snell in her bed covered by blankets except for

1 Defendant has submitted the statement of Dr. Stanton Kessler, Dr. Zane's former supervisor, repeating information he received from Dr. Zane's supervisor in Maryland to the effect that Dr. Zane's poor performance required him to stay on for a second year. (App. G) Attorney Joseph Krowski has submitted is affidavit recounting information from the same Maryland supervisor to the effect that Dr. Zane was fired by the Maryland office. (App. K)

the head. He arrived while police were there and was briefed by State Police Lieutenant Cummings.[2] (Tr. 954) Elizabeth Snell was laying face down, head slightly turned to the right, hands by the sides with palms up. The position of the hands signified to Dr. Zane "a very good chance that the body - that Elizabeth was moved after death." (Tr. 965-966, 992). At the home, Dr. Zane observed what he described as injuries to the face, which were photographed and in evidence. (Tr. 957) Without consulting his superiors, Dr. Zane made a preliminary diagnosis of death by smothering. (Tr. 994)

A day later he conducted the autopsy. His visual observations included small bruises and scrapes, on the face, hands, body and right ankle. He noted seventeen injuries. He examined samples from eight of them under a microscope to determine the age of the injuries. In his opinion, the injuries occurred around the time of death, up to an hour or two. Also, the fingernail polish on several fingers of both hands was chipped. (Tr. 962-969, 981-982, 992)

2 In his notes made after the visit to the home. Dr. Zane wrote "Restraining order against husband recently expired." (App. E, p.20) On cross-examination he stated that he did not recall talking about a possible cause of death before examining the body. (Tr. 993) On he other hand, he acknowledged that he "may have" received information at the house that Emory Snell was a suspect. (Tr. 1010). And, police witnesses testified that Emory Snell was considered a suspect before Dr. Zane arrived at the house. (Tr. 368-369, 718). Defense counsel failed to cross-examine the police witnesses to establish whether they told Dr. Zane of the restraining order before he had completed his preliminary findings.

Dr. Zane also observed petechial hemorrhages. They were just below the vocal chords and one was on the surface of the right lung. (Tr. 988). He also testified that, according to Forensic Pathology, a treatise by Vincent Di Maio, M.D., a victim of smothering would characteristically engage in a struggle. (Tr. 990-992).

In Dr. Zane's opinion, the cause of death was "asphyxia due to smothering." (Tr. 987). He did not state that his opinion was based on any degree of medical certainty or probability.

On cross-examination, Dr. Zane stated that he had developed a preliminary opinion of smothering as the cause of death when he first viewed the body. He acknowledged that he did not have the deceased's medical history at the time, nor had he made more than a superficial set of observations. There was a "prescription" inhaler in the bedroom, of the type used to treat asthma or difficulty in breathing. It was never tested. A chemical commonly used in inhalers, epinephrine, was known to cause heart arrhythmia.[3] Dr. Zane did not consult with a

3 The State Police inventory of items found at the home and elsewhere listed a "'Brooks' Bronchial Mist" found on a nightstand in the bedroom. (App. S). In his testimony, Dr. Zane likely was referring to this over-the-counter inhaler, since no other inhaler was listed. An over-the-counter inhaler, but not a prescription inhaler, would have contained epinephrine. (Kessler, App. G, para. 5). Dr. Zane also testified that a prescription inhaler might contain theophyllin, which was incorrect. (Id.) These errors with respect to a potentially crucial piece of medical evidence demonstrate Dr. Zane's overall incompetence, argued throughout this memorandum.

cardiologist or pulmonary specialist. (Tr. 994-999).

Dr. Zane stated that asphyxial death "in a way, and not fully, it's a 'diagnosis of exclusion'". (Tr. 1011). "[A] diagnosis of exclusion occurs when you have ruled everything else out." In this instance, he acknowledged that "I eliminated most of the possibilities". (emphasis added) (Tr. 1012). The causes "eliminated" were heart disease, based on a gross examination of the heart, and asthma, based on a gross examination of the lungs. A similar examination of other organs eliminated cirrhosis, and the toxicology tests eliminated such factors as street drugs, alcohol, or a high carbon monoxide reading. (Tr. 1013-1014).

On redirect examination, Dr. Zane testified that his was not "per se" a diagnosis of exclusion because there were "multiple areas of acute trauma in and around the time of death". (Tr. 1018). He denied that the inhalator caused death; nor did any heart abnormality or disease in the lungs, liver, brain, or kidneys. He cut random sections from these organs, put them in slides and examined them under a microscope. The petechial hemorrhages and the external injuries, the lack of natural disease and the negative toxicology screen contributed to his opinion. "I was left with -- with the one diagnosis" of asphyxia due to smothering. (Tr. 1020-1021, 1034).

The prosecutor posed a hypothetical question: "If you were to take these 17 injuries as you described them and their location on the body, particularly the abrasions on both sides of the face and the bruise on the right ankle, would they be consistent with a 6' 4 inch male weighing over 250 pounds grabbing her right leg at the ankle and holding her down . . . while pressing her head into a pillow"? Dr. Zane testified, "Absolutely". (Tr. 1026) Consistent with that were fresh facial injuries, which could have resulted from being forced into a pillow or struggling with the pillow (as might be evidenced by the chipped nail polish). (Tr. 1026-1027).

Based on Dr. Zane's observations of decomposition existing at the time he viewed the body, he placed the time of death asbetween 11:00 P.M. on Thursday night and 6:30 A.M. on Friday morning. (Tr. 1034). He had not listed a time of death on the death certificate. (Tr. 1037)

The defense had hired and consulted the late George Katsas, M.D., formerly of OCME. Dr. Katsas did not testify. Therefore the only expert heard on the decisive issue of cause of death was Dr. Zane.[4]

---

4 "[T]estimony emanating from the depth and scope of specialized knowledge is very impressive to a jury". . . .On a critical issue, a defendant's inability to present expert testimony in rebuttal can leave his defense "devastated" Ake v. Oklahoma, 470 U.S. 68, 81 n.7, 83 (1986)(citations omitted.)(psychiatric testimony in death penalty case).

Testing of Bedding. The pillows and bedding were taken to the State Police Laboratory and analyzed. The analyst tested the pillow cases for blood and found one "light" or "minimal" stain on one pillowcase. She did not find blood on the other. The bloodstain was not tested to determine its source.[5] (Tr. 865-866) The pillow case was not tested for "mucous or phlegm or anything like that". (Tr. 871). She observed "some staining" on the pillowcase that did not have a blood stain, and on the bottom sheet. (Tr. 835-836) The top sheet contained nothing of evidentiary significance. (Tr. 866). The blanket contained a semen stain; its source was defendant. (Tr. 829; 912) There were two strands of hair in the deceased's hand. They were not defendant's hairs. (Tr. 843; 908) There was no testimony that the bedding had been examined for nail polish chips. The written report establishes the absence of any blood, mucous, fluids or other evidence of significance on the pillows, clothes, or bedding. (App. R)

The State Laboratory testing yielding no evidence of stains on the pillow or bedding was corroborated by forensic pathologists consulted by post-conviction counsel. Dr. Stanton

---

5 The bloodstain was on the pillow from the right side of the bed. (Tr. 865) The body was found on the left side of the bed. The deceased was face down, turned slightly to the right, on the pillow which did not have a blood stain. (Tr. 955) (identifying scene photos).

Kessler reviewed "the scene photographs of the Snell bedroom where the body was found, the pillow under the face and bed sheets were free of secretions." (App. G, para. 10) Dr. Thomas Young found "no blood or fluid stains in the pillowcase". (App. E., p. 13). Dr. Michael Baden stated that "there was no forensic evidence on the pillow or bedding". (App. H, pp. 2-3; 4/23/15)

Post-conviction investigation. Represented by new, retained counsel,[6] Emory Snell began, in 2005, to contact forensic pathologists to obtain second opinions on the autopsy conducted in this case. The pathologists were Edward Friedlander, M.D., Thomas Young, M.D., Stanton Kessler, M.D., Gerald Feigin, M.D., and Michael Baden, M.D. Their opinions contradicted Dr. Zane's conclusions in all material details and demonstrate that his autopsy was fundamentally flawed. With Dr. Zane's few findings effectively demolished, there was left no scientific basis for a medical opinion of smothering. The

6 Retained counsel represented Emory Snell from about 2005 until May 2015. Until Belinda Souza offered financial assistance, (App. N) Mr. Snell was dependent on appointed counsel for his appeal and first new trial motion. He had no funds and appointed counsel did not seek funds for expert assistance in challenging the autopsy. With Ms. Souza's assistance, retained counsel was able to hire forensic pathologists. Since 2015, CPCS-appointed counsel has represented Mr. Snell.

following is a summary of their opinions.

Dr. Zane's competence. At the time of the autopsy, Dr. Zane's level of competence was unacceptable according to Dr. Stanton Kessler. In the mid-nineties, Dr. Kessler was chief of staff of the Office of Chief Medical Examiner, "responsible for Zane's work product following the completion of his fellowship in Maryland." [7] Directly under Kessler in the chain of command was Dr. James Weiner who was tasked by Kessler with supervising Zane. Because Zane "lacked expertise in forensic pathology", had poor decision making, showed severe anxiety, and sometimes could not control his temper, Dr. Kessler had forbidden Dr. Zane from conducting any homicide autopsy unsupervised. Dr. Zane violated this restriction by conducting the Elizabeth Snell autopsy on his own. "Dr. Weiner tried as best he could to watch him, but it looks like Zane, for whatever reason, intentionally slipped this case under the wire." (App. G, ¶¶ 2, 12)(emphasis in original). And "[a]fter my tenure in the OCME ended, I discovered that the office forbid [sic] him from performing

7 Dr. Kessler stated that he had worked closely with John Smialek, M.D., who was chief medical examiner in Maryland and Dr. Zane's supervisor when Zane did fellowship training. He told Dr. Kessler that he "required Zane to take an extra year of training because of his poor performance." (App. G,¶ 1) According to Attorney Joseph Krowski, he had spoken with Dr. Smialek in 1998 about Dr. Zane. Dr. Smialek had told him that Dr. Zane was terminated after one year because he "was unfit to perform forensic pathology." App. K) Dr. Zane's CV indicates that he began work for OCME in 1987, after leaving the Maryland office. (App. A)

autopsies in possible homicide cases due to his documented gross incompetence in other cases."[8] (Id. ¶12) In addition, Dr. Zane violated policy by conducting the autopsy at the Pocasset facility instead of Boston, where state of the art equipment was installed. The equipment allowed advanced techniques for discovering fingerprints, as well as hairs, fibers and other trace evidence, and also provided high resolution photography (¶ 13).

> "These examinations would take up to six hours to complete and could not be completed at the scene or other offices. These techniques were and are state of the art in forensic science. They were reserved for any case of close contact suspected homicide. Zane was aware of this lab and how we utilized it. He avoided calling the Boston office, did not bring the case in for a supervised autopsy and did not alert the State Police about the need to retrieve trace evidence." (¶¶ 2, 3)

Dr. Kessler concluded that the Elizabeth Snell autopsy lacked scientific credibility: "From these observations, I think that Zane did not have an understanding of basic medical knowledge. Essentially, he is negligent. His inability to follow up with a treating physician, his disregard for the inhaler or its proper documentation, his handling and numerous

---

8 In 2007, the Commonwealth's Secretary of Public Safety ordered that Dr. Zane be suspended from performing autopsies in homicide cases. (App. I) It is not known whether Dr. Kessler was referring to this suspension, or some other action restricting Dr. Zane.

other errors in judgment that compounded errors were so serious that he was not credible in determining any scientific basis for the cause of Elizabeth Lee Snell's death." (¶ 6) "No pathologist reviewing the case and exercising due care would fail to notice that there is something gravely wrong here." (¶ 7) (quoting Dr. Friedlander).

Conclusions of Experts. Three of the other pathologists consulted in the past ten years concluded to a medical certainty that the record of the post-mortem examination did not support a finding of death by asphyxiation:

* Dr. Young's conclusions. "Death by asphyxia due to smothering was not proven in accordance with accepted, prevailing forensic pathology standards and reasonable *medical certainty or probability.*" (App. E, p. 20) "The conclusion of asphyxia is therefore inconsistent with reasonable medical certainty or probability and accepted prevailing forensic pathology standards." (Id., p. 16)

* Dr. Baden's conclusions. Dr. Baden stated: "It is my opinion to a degree of medical certainty . . . that there is no scene, autopsy, or forensic evidence to support the diagnosis [of] homicidal smothering; that a natural fatal cardiac arrhythmia is more likely to have caused her death.. . . "
(App. H, p. 3)

* Dr. Feigin's conclusions. Dr. Feigin gave his "opinion to a reasonable degree of medical certainty, based on all of the materials that I have reviewed, there are no autopsy findings to support a diagnosis of homicidal asphyxia and, on the basis of the information available to me, the cause of death is most likely myocarditis or other heart condition." (App. F, ¶ 19) "I opine that, to a reasonable degree of medical certainty, Dr. Zane's findings do not support the diagnosis that Elizabeth Snell perished as a result of asphyxiation." (Id., ¶ 12)

Specific criticisms of autopsy. The consulting pathologists identified the following detailed errors and omissions in the autopsy:

1) Mistaken finding that injuries occurred at time of death. Dr. Zane gave the opinion that 17 injuries to the body, eight of which he examined microscopically, occurred near the time of death. This was the most important -- almost the only -- finding by Dr. Zane of physical evidence of a smothering. It has been contradicted in detail by four pathologists.

Dr. Young summarized, "Dr. Zane's opinions [about the 17 injuries] are inconsistent with reasonable medical certainty or probability."[9] (App. E, p. 15). Dr. Young supplemented his

9 Dr. Zane did not couch his opinion, either before the Grand Jury or at trial, in terms of "reasonable medical certainty" or

detailed 2011 report with a letter, dated September 4, 2013. (App. E). He discussed his examination of the photos of the decedent's face in detail. The defects noted by Dr. Zane were attributable to the decomposition which had occurred before Dr. Zane viewed the body and did the autopsy. Significantly, the lack of any sign of bleeding contradicted the notion that the defects occurred before death. The lack of blood on the pillow and bedding confirmed this. "None of these findings reach level [sic] of being suggestive of a struggle or a homicidal event."

According to Dr. Kessler, "microscopically, there was no vital reaction[10] seen. There is no evidence of any trauma in this case." (Kessler, App. G, ¶5) "[T]he mouth contains no trauma including buccal abrasions, contusions, or lacerations. . . . There is no sign of a struggle, no defensive injuries to the

---

probability. Consciously or not, this omission reflected the superficiality of the autopsy. Dr. Young concluded that a "rush to judgment" was evidenced by Dr. Zane's haste in forming an opinion without conforming to the profession's requirements of a thorough autopsy as a basis for opinion. "He offered the opinion sought by the district attorney." (App. E, p. 16). Dr. Zane's opinion was also apparently influenced by being told at the scene that "Restraining order against husband recently expired." (App. E., p. 20, quoting Dr. Zane's "Report of Death")

10 The lack of "vital reaction" refers to any bodily reaction to the injuries, such as bleeding. Injuries inflicted after death, as by moving the body, would be consistent with lack of vital reaction. ("postmortem defects do not bleed because there is no blood circulation from a pumping heart. . . . There are no blood or fluid stains in the pillowcase or other indication that these defects were made when the decedent was alive. Injuries that occur when someone is alive will bleed.") (App. E, pp. 11-12)

extremities, and no mouth trauma. There are only insignificant findings to non vital areas that appear to be post mortem in nature, and are all in gravity dependent areas. (Feigin, App. F, ¶ 15) (see also, Young, App. E, pp. 8, 11-12). "The so-called injuries on the face occurred postmortem (occurring with the handling and moving of the body after death). There were no facial injuries consistent with injury or foul play." (Id., p. 11) Decomposition renders the skin susceptible to such post-mortem injuries. Id. "There were no signs of suffocation or a struggle in this case. Usually there are torn tie downs, fremulae under the lip, gum, lip, facial, neck, and nasal or tooth trauma. . . . as well as cyanosis and petechiae in buccal mucosa and eyes." (Kessler, App. G, ¶ 11)

Dr. Baden averred that "[m]icroscopic examination by me shows that [the 17 injuries] could have occurred at different times, well before death . . . . " (App. H. p. 2) Chipped nail polish was not attributable to a struggle but to normal wear. (Young, App. E, pp. 13, 14) Dr. Friedlander examined three of the lip cuttings taken by Dr. Zane and found two without any abnormalities; a third "infinitesimal lesion", was an "overcall from a pathologist eager to find the oral bruises of smothering when they were not visible grossly." (App. D). Dr. Young agreed with Dr. Friedlander on each of these points.

(App. E., pp. 7, 13).

2) Absence of blood, fluids or trace evidence on pillow, clothing or bedding. Dr. Zane did not testify about the lack of trace evidence, including blood or fluids on the pillows or bedding. (The State Police Laboratory witness found no blood on the deceased's pillow and mentioned "stains" on the pillow and bedding, in passing, without suggesting that there was any basis for suspicion or further testing, (supra at pp. 8-9). Smothering would have resulted in evident secretions. (Young, App. E, pp. 12,13); (Baden, App. H, p. 1)(pillow). "During an intentional suffocation, there is always a struggle and the autonomic nervous system goes into overdrive as the person attempts to survive. Numerous glands produce excessive amounts of secretions from the nasal sinuses and mouth.") (Kessler, App. G, ¶10). The large amount of edema produced in the lungs often overflows onto a pillow. (Young, app. E, p. 10) As former OCME Chief of Staff Stanton Kessler, M.D., noted, Dr. Zane should have followed protocol and used the state of the art equipment at the OCME Boston facility. If he had done so, the photographic and other equipment could have detected the presence or absence of trace evidence on the body. (App. G, ¶3) During the autopsy, there was no blood noted on the body.

Significantly also, there was nothing in the video and

photos of the bedroom showing a disturbance of the bedding or clothing which would have accompanied a struggle during a smothering. "It is not a simple matter to alter a scene and make it look without suspicious features when a dead adult female lies on a bed with covers and sheets. Telltale signs of a struggle - none of which exists in this case - would have been difficult to remove." (Young, App. E, p. 10, para. D)

3) Absence of edema in lungs precluded asphyxia. Dr. Zane did not comment on the lack of edema in the lungs. In fact, smothering would have caused edema, a fluid buildup. "Lungs in asphyxial deaths characteristically reveal marked congestion and copious edema fluid." (Young, App. E, p. 12) Lack of edema is consistent with sudden death from heart failure. (Young, p. 5), para. A). The differing weight of each lung in this case tended to exclude asphyxia. "[I]n homicidal suffocation, the lungs are equally heavy weighing at least 800 to 1000 grams. Here, one lung is light and the other one heavier, but well below the severe congested weights seen in an asphyxial death." (Kessler, App. G, ¶11). The lungs here weighed 490 grams and 620 grams. (App. A, Autopsy Report, p. 4)

4) Absence of cyanosis. Dr. Baden, citing Forensic Pathology by Di Maio, noted "cyanosis, a bluish color to the skin, is a classic finding in asphyxial deaths, but this was not

present in Mrs. Snell . . . ." (App. H, P. 2) (emphasis added)

Dr. Kessler also noted that cyanosis would be present in an asphyxial death. (App. G., ¶ 11)

5) Absence of eye and lung petechiae. Dr. Zane observed no petechiae in the eyes. The absence of petechiae in the eyes negates the possibility of smothering. (Young, App. E, p. 12) Dr. Zane observed petechiae on one lung. (Tr. 988) A finding on only one lung does not support asphyxia. (Feigin, App. F, ¶ 14). Moreover, "Dr. Zane referred to Dr. Di Maio's book, Forensic Pathology as supportive of his diagnosis of smothering, but that book clearly states that petechiae on the lungs and vocal chords have no relevance to smothering".) (Baden, App. H., p. 2).

6) Mistaken interpretation of larynx and lung petechiae. Dr. Zane did observe two petechiae just below the vocal chords, and on one lung. "Petechiae alone in the larynx does not allow a determination of smothering. There should be additional trauma which was not present." (Feigin, App. F, ¶ 16) "Petechiae in these areas are not specific for asphyxia . . . ." (Young, App. E, pp. 12, 15). "[P]etechiae on the lungs and vocal chords have no relevance to smothering." (Baden, App. H, p. 2). Further, according to Dr. Kessler, the Zane finding of petechiae was incorrect. Dr. Kessler interpreted the

discoloration as due to gastric juices during decomposition. Even if petechiae existed in the larynx, they would "not make this a homicide". (App. G, ¶¶ 9, 11) Dr. Young observed in the photo no petechiae on the vocal chords. (App. E, p. 15)

7) Absence of facial and other compression injuries. There was no compression injury to the nose, mouth, or neck, which contradicted the finding of smothering. (Baden, App. H, 5/2/14, ¶14)(Kessler, App. G, ¶11) (Feigin, ¶13)(no mouth trauma) (Young, App. E, p. 13) There was no finding of fracture of the hyoid bone or cartilage.[11] (Id., p. 7)

8) Irrelevance of observed facial and body injuries. The injuries to the face noted by Dr. Zane did not support the prosecutor's hypothetical question suggesting a forcing of the face into the pillow (Young, App. E, p. 8) Nor were the injuries noted elsewhere on the body other than minor and attributable to normal daily activities. (Id. pp. 14, 15, 18) (Baden, App. H, p. 2). Again, Dr. Zane's answer of "absolutely" to the hypothetical was not plausible. A smothering victim held by the head and ankle would struggle violently,

11 Dr. Zane's bold answer "Absolutely" (Tr. 1026) to the prosecutor's hypothetical about the alleged smothering being consistent with a large man holding down the head and ankle tends to be contradicted by Dr. Young's observations about bone and cartilage fractures. Again, defense counsel failed to challenge Dr. Zane's unwarranted certainty.

producing injuries to self which were non-existent.[12] (Young, Ap. E, pp. 7, 10, 18-19)(Feigin, App. F, ¶15)(Baden, App. H, p. 2)

9) Mistaken timing of death. Dr. Zane did not testify about the presence of undigested dinner food in the deceased's stomach or about the minimal urine retained. Those facts place the time of death as shortly after the evening meal and contradict the Zane estimate that death could have been as late as 6:30 A.M. the next morning. (Baden, App. H, p.2) Moreover, Dr. Zane also did not take into account the temperature of the overheated house and its effect on decomposition, which undermined further his estimate of time of death. (Young, App. E, pp. 17-18) If death occurred the previous evening, the testimony of Robert Rozen placing Emory Snell in the driveway of the home at 6:30 A.M. loses relevance and credibility. As the defense attempted to show, partly through a meteorologist witness, Mr. Rozen was mistaken as to the day he saw defendant.[13]

10) Failure to test or evaluate inhalator as possible cause

12 The autopsy sketches documented no injuries to the rear of the body, other than the ankle bruise. (App. A)

13 Defendant has submitted an affidavit of Robert Lautzenheiser, a meteorologist, who provided more conclusive evidence that a "nor'easter" covered Cape Cod that morning and conditions were were rainy, contradicting witness Rozen. (App. L)

of death.[14] The inhalator, if prescribed, should have been tested, the doctor who prescribed it should have been contacted, and the deceased's medical history examined. Asthmatics are known to die in their sleep and be found laying face down. (Kessler, App. G, ¶¶ 5, 6) However, because the search warrant inventory listed only a "Brooks Bronchial Mist" inhaler on a nightstand, (App. S) what Dr. Zane observed was obviously an over-the-counter inhaler. That would contain epinephrine, which "can cause severe cardiac and blood pressure problems." (Young, App. E, pp. 8, 9)(App. X, Contemporary Media Reports of Inhaler Dangers). The inhaler was never tested, the toxicology test did not screen for epinephrine, (App. A) and the heart examination (discussed infra) was superficial. Dr. Zane's neglect of the inhalator and its implications left untouched "the clue that would facilitate finding the cause of . . . death." (Kessler, App. G, ¶ 6) As Dr. Kessler noted, "at the time of her death in 1995, about one to two asthmatics died each year in Massachusetts in their sleep. Those asthmatics were

14 About a month before her death, Elizabeth Snell's lungs were X-rayed at Falmouth Hospital. The records show that she complained of "cough". The X-rays were negative for abnormalities. (App. V) None of her other medical records are available. Dr. Zane did not obtain any medical records. He testified that he spoke with Dr. Boucher, a urologist, who had prescribed Macrobid for Mrs. Snell. See fn. 15, infra.

often found face down in their beds by family members."[15] (para 5) . Dr. Friedlander averred that "death was consistent with a cardiac rhythm problem, in a woman predisposed by the use of at least one asthma medication, whose coronary artery status is not adequately documented."[16] (App. D, p. 4)

11) No basis for testimony that position of body indicated movement after death. The position of the body, face down, with palms up, eyes closed, was, contrary to Dr. Zane,[17] consistent with a natural death. The head may have been turned into the pillow by agonal movement from heart failure. (Young, App. E., p. 11) Dr. Zane's opinion that the body had been moved after death was also contradicted by the absence of tardieu spots an indicator of movement which "may appear in an anti-gravity position". (Kessler, App. G, ¶8) The observed lividity in the body was all consistent with the position in which the body

---

15 Dr. Boucher prescribed Macrobid, an antibiotic to treat urinary tract infections. Dr.Zane did not discuss Macrobid as a possible factor in the death. According to the FDA's warning data, Macrobid can have serious, even fatal side effects. (App. S)

16 Defendant Emory Snell has submitted his affidavit. (App. Y). He recounts that Elizabeth Snell, in the week preceding her death, experienced serious shortness of breath, nausea and dizziness. She bought and frequently used the over the counter inhaler found near her bed. (¶¶ 10-11).
The affidavit also sets forth in detail Mr. Snell's memory of the facts and developments in his case, before, during and after trial.

17 Dr. Zane stated that the position of the body indicated to him "a very good chance that the body . . . .. was moved after death." (Tr. 994). He mentioned only the position of the arms and hands parallel to the body, with the palms upward. He gave no explanation for this conclusion or mention of supporting forensic literature.

was found. This indicated that the body had not been moved. (Young, App. E, p. 11)

12) Unscientific "Diagnosis of exclusion." It was not accepted sound practice to call asphyxia a diagnosis of exclusion. Asphyxia causes a victim to struggle violently, leaving evidence of the struggle on her face and body. (Young, App. E, pp. 7, 10) There would also be abrasions to the lips "consistently with the lips being forcibly pushed against the teeth." Petechiae would be evident in the face and eyes. Pulmonary edema "wet lungs" would be present. "Lungs in asphyxial deaths characteristically reveal marked congestion and copious edema fluid." (Id. p. 12)

Dr. Zane's diagnosis by exclusion was thus scientifically unsound. The "inclusions" in his diagnosis were also wrong. The superficial injuries observed by Dr. Zane have been persuasively explained by the consulted pathologists as not inflicted at the time of death. (supra, pp 14-16.) And his finding of petechiae have been shown to be unrelated to asphyxia. (supra, pp. 19-20) Most importantly, in this case, Dr. Zane failed to exclude the many scientific clues to the absence of asphyxia detailed in the reports of the pathologists.

13) Mix-up of organ tissue samples from different bodies. Dr. Zane's exclusion of natural causes was based in part on his

microscopic examination of sections taken from the heart, liver and other organs. Dr. Friedlander's and Dr. Young's later review of the slides containing the samples revealed that the cuttings came from different persons. The liver samples were from two persons. One of the heart sections was from a baby. (Friedlander, App., D, 4/2/06; Young, App. E, p.6). The mix-up of the slides rendered untrustworthy Dr. Zane's opinion excluding natural causes in the heart or liver as a possible cause of death. (Id. p. 6). The episode also added evidence to the unreliability and incompetence of Dr. Zane's conduct of autopsies. (Kessler, App. G, ¶7)

14) Incompetent heart tissue examination. Dr. Zane violated well-established standards of pathology in not examining sufficient tissue samples of the heart to rule out myocarditis (inflammation of the heart muscle), and irregularity in the cardiac conduction system of electrochemical impulses; and in not examining the deceased's medical history to rule out precursors of heart failure such as palpitation, fainting spells, abnormal electrocardiograms, or sudden cardiac death among family members. Nor did he order tests for possible genetic abnormalities which can cause heart failure. It was a failure for him to restrict consideration of heart disease to coronary artery and hypertensive disease. (Feigin, App. F, ¶ 18)

(Young, App. e, p. 5)(Baden, App. H, p.3) As Dr. Zane's testified, he only conducted a "gross" examination of the heart. (Tr. 1013) "The decedent allegedly had episodes of shortness of breath requiring the use of an inhaler, yet the autopsy did not disclose evidence of asthma in the lungs. The intermittent shortness of breath may have been a sign of intermittent abnormal cardiac function."[18] (Young p. 5)

15) Incompetent lung tissue examination. Dr. Zane took only one cutting of lung tissue and it did not contain any bronchioles, which are needed to assess the presence of bronchial asthma. His opinion excluding asthma was therefore untrustworthy. (Young, App. E, p. 6)(Friedlander, App., D, 3/31/06)

16) Opinion before examining tissue slides. Dr. Zane's March 19 diagnosis of homicidal asphyxiation could not have been based on examination of the histology slides because they would have taken up to two weeks to be returned to him for examination. (Kessler, App. G, ¶5) This evidenced a rush to judgment in violation of accepted standards of pathology. (Young, App. E, p. 16)

---

18 See "Study Shows Nearly Fivefold Increased Risk for Heart Attack After Angry Outburst." Beth Israel Deaconess Medical Center (2014) (App. U). Elizabeth Snell died in the hours following her calling police, having defendant arrested, and requesting a 209A restraining order.

Argument

THIS MOTION PRESENTS NOVEL, SUBSTANTIAL ISSUES CALLING FOR AN EVIDENTIARY HEARING.

Introduction. A "latticework" of errors not preserved at trial will justify allowance of a Rule 30(b) motion. Such errors justifying a new trial include a substantial risk of a miscarriage of justice, newly discovered evidence, and ineffective assistance of counsel. Commonwealth v. Rosario, 477 Mass. 69, 77-78 (2017). See also Turner v. United States, 582 U.S. __ (June 22, 2017); Brady v. Maryland, 373 U.S. 83 (1963). (failure of prosecution to disclose exculpatory evidence). All of the foregoing errors are presented in the present motion for a new trial.

Recent case law from the Supreme Judicial Court establishes that errors fitting each of the above categories should not be analyzed in rigid isolation. The Court hearing a new trial motion should focus on the "latticework" where the cumulative effect, the "confluence" of the factors "act[ing] in concert" should be weighed. See Rosario, 477 Mass. at 77-78; Commonwealth v. Ellis, 475 Mass. 459, 481 (2016); Commonwealth v. Epps, 474 Mass. 743, 767-768 (2016); Commonwealth v. Brescia, 471 Mass. 381, 396-397 (2015). The following factors should be considered in that framework.

Issues calling for a new trial.[19] With the foregoing authority in mind, serious errors are raised in the present new trial motion which should be considered separately and cumulatively. They are summarized here and developed in the course of this memorandum.

* The 2011 Stanton Kessler statement (App. G) is newly discovered evidence showing, inter alia, that the prosecution suppressed exculpatory evidence that the Office of Chief Medical Examiner [OCME] had imposed a fundamental restriction on Dr. William Zane, barring him from conducting any suspected homicide autopsies without supervision of one of the senior assistant medical examiners; and that a close contact suspected homicide autopsy was to be undertaken using advanced technology available only at the OCME Boston facility, not at Pocasset where Dr. Zane performed the autopsy. Together with other newly developed expert evidence, the Kessler report documents a substantial risk of a miscarriage of justice. And, the prosecution's failure to disclose this information constituted withholding of exculpatory

19 The Rule 30(b) motion in this case is being filed together with, inter alia, a motion for discovery under Mass.R.Crim.P. 30(c)(4). The Court, on August 20, 2015, denied without prejudice defendant's previous discovery motion, noting that it should be accompanied by a new trial motion and showa "prima facie case for relief". (Docket #186). Inasmuch as allowance of the pending discovery motion may yield additional evidence in support of this Rule 30(b) motion, defendant anticipates moving to amend his Rule 30(b) motion to state whatever facts or additional grounds for relief are disclosed in discovery or by investigation.

evidence in violation of defendant's federal and state constitutional rights.

* The Kessler statement, as corroborated by the Joseph Krowski affidavit (App. K), demonstrates that prior to his hiring by the OCME, Dr. Zane's competence was judged deficient by his supervisor, the Maryland Medical Examiner, Dr. John Smialek. This and other potentially exculpatory evidence of incompetence in the OCME file on Dr. Zane was not disclosed by the prosecution to the Snell defense. Dr. Zane's testimony at the Grand Jury and at trial, omitting his negative history at the Maryland facility, therefore could not be challenged. Nor did the defense have any other information reflecting negatively on Dr. Zane's competence at the time of trial, such as revealed in Dr. Kessler's 2011 statement. That information is the subject of the discovery motion filed with the Rule 30(b) motion.

* Subsequent to the trial in this case, numerous other instances of Dr. Zane's incompetence came to light, culminating in the 2007 order of the Massachusetts Secretary of Public Safety temporarily barring him from performing autopsies.[20]

---

20 The media reports are summarized and included in Exhibit I. The referenced reports concern the following cases where Dr. Zane was the Assistant Medical Examiner:

* Commonwealth v. Peter and Daniel McGuane (2007) (Zane negligence in handling deceased's brain led to his falsely testifying that flattening of brain was due to trauma. Dr. Zane's incompetence led directly to the Commonwealth's Secretary of Public Safety suspending him from performing suspected homicide autopsies.

(App. I, p. 1) Together with the expert evidence, this newly discovered material demonstrates a substantial risk of a miscarriage of justice.

* Dr. George Katsas, retained to consult for the defense was ineffective in that he failed to identify significant scientific errors and omissions in the autopsy depriving counsel of crucial information needed effectively to cross-examine Dr. Zane.[21] The case went to trial only four months after

---

* Commonwealth v. Anthony Calabro, et al. (2004)("shoddy" and "minimal" work led to Dr. Zane's false determination that the cause of death was accident rather than homicide.
* Commonwealth v. Kevin Jackmon (1999)(false determination that deceased was "shot by police" based on information from police before autopsy)
* Morris Pina (1996)(jury in civil action rejected Dr. Zane's autopsy finding of death by cocaine overdose; cause of death -as opined by Michael Baden, M.D. - was a choke hold administered while Pina was beaten in police custody). The autopsy by Dr. Zane occurred in 1990.
* In addition to the foregoing, the Boston Globe reported in 2003 that Dr. Zane had sent the wrong person's eyeballs out for testing in a suspected shaken baby case.
* And, in 2006 the Cape Cod Times reported that Dr. Zane had corrected an autopsy report in the David Hill case, where he mistakenly stated that a bullet traveled through the head, front to back; in fact, the bullet traveled back to front.
* Michael Barasco (1987) Dr. Zane gave the opinion of drug overdose as the cause of death, but did so before receiving toxicology results. Case alleged jail guards' brutality as cause of death.
* Douglas Staples (1988). Suspected case of jail guards' brutality. Dr. Zane gave opinion of natural causes death.
* A "Media Summary Info", included after the above individual articles.

21 Dr. Zane was cross-examined by Attorney Sandra Bloomenthal, who has declined to provide an affidavit to be submitted with the pending Rule 30(b) motion. (Shea Affidavit, App. J). Attorney Bloomenthal's cross-examination was limited to a few issues, failure to examine the decedent's medical history, failure to test the inhaler in the bedroom, and failure to consult a cardiologist or

indictment. As it developed, Dr. Katsas had little to offer, as the very limited and ineffective cross-examination of Dr. Zane shows.

* Counsel was ineffective in relying on Dr. Katsas as an expert consultant and deriving only limited information for cross-examination from him. He did not testify. Attorney Bloomenthal who cross-examined Dr. Zane evidently did not take steps to replace Dr. Katsas. The record, however, suggests that counsel may have sought a continuance and funds for a second consulting pathologist shortly before trial began[22] Defendant Snell's access to cash was blocked by an order of the Probate Court[23] entered on April 21, 1995. At that point, he was indigent, unable to fund an effective pathologist to consult, and the case rushed to trial in August 1995. (See Motion for Funds, Docket #12).

* The many scientifically significant errors and omissions

---

pulmonary specialist. (Tr. 8/994-999). The many specific criticisms of the autopsy offered by the five experts summarized supra, contrasted with the minimal cross-examination of Dr. Zane, demonstrate that Dr. Katsas failed to supply defense counsel with many available bases for cross-examination.

22 Lead trial counsel Bielitz informed present counsel for defendant that he had, shortly before trial, in the judge's lobby, requested funds for a second pathologist because trial was approaching and he was dissatisfied with the lack of assistance from Dr. Katsas. However, Mr. Bielitz failed to return a promised signed affidavit to that effect to present counsel and is now in Mexico until May 1. (App. J).

23 Estate of Elizabeth Lee Snell, No. 95-E-00190GCI.

of the autopsy as detailed by the five forensic pathologists consulted by the defendant in the past ten years are newly discovered and present a substantial risk of a miscarriage of justice. The pathologists' reports demonstrate that the autopsy testified to by Dr. Zane had no scientific basis and that the jury verdict was based on a fatally flawed opinion of asphyxiation as the cause of death.

* There was ineffective assistance of counsel in failing to rebut evidence submitted by the prosecution about Emory Snell's activiites on March 16 and 17. In particular, Robert Rozen's testimony placed Emory Snell at the marital home on Friday morning, March 17, at 6:30 a.m. This could have been discredited, if the defense had adduced additional available evidence discussed infra, pp. 63-66.

The issues were not waived[24]. The errors in the present case were not raised in defendant Snell's 1998 and 2001 new trial motions.[25] The errors should be considered on the

24 This memorandum argues the issue of waiver in detail because the Court (Muse, J.), in denying defendant's motion for reconsideration of the 2015 motion for discovery, advised defendant to address the question of waiver. (Docket # 188)

25 There were two previous Rule 30(b) motions filed in this case. Appellate counsel filed one motion in 1998, which was denied, and the denial affirmed in the SJC's review of the conviction. 428 Mass. 266 (1999). Emory Snell, pro se, filed a second motion in 2001. It was denied,and the SJC Single Justice denied further review in 2002. SJ-2001-0394.

merits and none should be deemed waived.

Under Mass.R.Crim.P. 30(c)(2), all grounds for relief should be raised in a first new trial motion: "Any grounds not so raised are waived unless the judge in the exercise of discretion permits them to be raised in a subsequent motion, or unless such grounds could not reasonably have been raised in the original or amended motion."

Waiver should not apply in this case for several reasons.

Newly discovered evidence.

Kessler statement. First, the present motion is based in part on newly discovered, exculpatory evidence which was not disclosed by the prosecution and not uncovered until 2011 when new post-conviction counsel spoke with Dr. Stanton Kessler and learned from him details of Dr. Zane's incompetence in 1995 and the restrictions which Dr. Zane violated in performing the autopsy in this case. (App. G)

The letter of Dr. Stanton Kessler to defendant's counsel is cognizable, both as a basis for post-conviction discovery under Mass.R.Crim.P. 30(c)(4), and substantively in support of the Rule 30(b) motion. The basis for considering Dr. Kessler's statement both substantively and in support of discovery[26] is as

26 A discovery request may be based on hearsay if the contents of the hearsay were based on personal knowledge. Commonwealth v. Lampron, 441 Mass. 265, 271 (2004)(discussing Mass.R.Crim.P. 17(a)(2). Should the Court decline to treat the unsigned statement as the

follows.

Dr. Kessler died eight months after submitting the statement to counsel. Accordingly, a signed affidavit cannot be submitted. Nonetheless, the statement should be credited. The Supreme Judicial Court resolved a similar issue favorably to a defendant where the declarant had signed an affidavit but died before testifying to its contents. It was based on personal knowledge, like the Kessler letter, but not admissible as a dying declaration. The Supreme Judicial Court nonetheless held the affidavit potentially admissible in the circumstances because it was newly discovered evidence "critical to [the defendant's] defense" and bore "persuasive assurances of trustworthiness." As such, the exception to the hearsay rule is constitutionally based. Commonwealth v. Drayton, 473 Mass. 23, 36 (2015), quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The Kessler statement, in comparison, lacks only the attestation accompanying an affidavit. Its reliability in the

---

equivalent of an affidavit supporting post-conviction discovery, it may be viewed as hearsay, attested to in the affidavits of Gary Pelletier and Christine MacDonald. Under Lampron, the Kessler statement would be cognizable.

The John Smialek, M.D. hearsay concerning Dr. Zane's employment at the Maryland Medical Examiner's office is also cognizable. The information from Dr. Smialek tends to show that the personnel records of Dr. Zane, which began after his employment in Maryland, may contain similarly critical assessments which were not disclosed in discovery in the present case. By the same token, the Krowski affidavit, recounting Dr. Smialek's criticism, should be considered in support of the discovery motion.

absence of a sworn attestation is supplied by Attorney Gary Pelletier, who had requested the statement and discussed its contents at length with Dr. Kessler. Obviously, Dr. Kessler, as OCME Chief of Staff, had personal knowledge of all its contents.

The statement should be considered in support of the present motion and be admissible at an evidentiary hearing on the new trial motion.[27] Commonwealth v.Drayton, 473 Mass. at 36. The facts contained in the statement, showing that Dr. Zane conducted the autopsy in violation of fundamental restrictions imposed on him, are critical to the defense. This is one of those "rarest of cases where otherwise inadmissible evidence is both truly critical to the defense's case and bears persuasive guarantees of trustworthiness." Id. at 40. The facts completely destroy the credibility of Dr. Zane's autopsy.[28] And,

---

27 Drayton is relatively new authority. Whether hearsay offered under Drayton is reliable should be considered in light of analogous, existing authority. In the context of evaluating the reliability of hearsay at a probation violation hearing, the Supreme Judicial Court has noted that "the hearing judge may consider (1) whether the evidence is based on personal knowledge or direct observation; (2) whether the evidence, if based on direct observation, was recorded close in time to the events in question; (3) the level of factual detail; (4) whether the statements are internally consistent; (5) whether the evidence is corroborated by information from other sources; (6) whether the declarant was disinterested when the statements were made; and (7) whether the statements were made under circumstances that support their veracity." Commonwealth v. Hartfield, 474 Mass. 474, 484 (2016)

28 According to the Kessler letter, (1) Dr. Zane in 1995, due to personal and professional shortcomings, was forbidden to perform any suspected homicide autopsies without the supervision of Dr. Kessler or Dr. Weiner; (2) when supervision was not available at Pocasset,

by reason of its credible source, Dr. Zane's former superior, its self-corroborating detail, and the extrinsic corroborating media reports of Dr. Zane's pre- and post-1995 incompetence, it bears "persuasive assurances of trustworthiness". The trustworthiness of the Kessler statement from 2011 is further supported by the media reports of Dr. Zane's incompetence and, ultimately, the 2007 intervention of the Commonwealth's Secretary of Public Safety in suspending Dr. Zane from performing suspected homicide autopsies.[29]

The Kessler statement should be considered in support of the new trial motion *and* as evidence admissible at a Rule 30 hearing under Drayton. Had the Commonwealth fulfilled its Brady duty of disclosure of the restrictions on Dr. Zane's solo homicide autopsies, defendant could have called Dr. Kessler and any other competent witness, including Dr. Smialek, to testify to the details memorialized in Dr. Kessler's 2011 statement. The

---

Dr. Zane was directed to bring such autopsies to the Boston office for supervision; (3) a suspected close contact homicide autopsy was to be performed at the Boston facility where state of the art equipment permitted recovery of evidence such as fingerprints, and trace evidence such as hairs and fibers. In defiance of these directives, Dr. Zane performed the autopsy unsupervised at Pocasset. (Dr. Zane "for whatever reason intentionally slipped this case under the wire.") (App. G) (emphasis in original).

29 See also the OCME Privilege Log (App. Q) which serves as one basis for the defendant's requested discovery of Dr. Zane's personnel file and OCME supervision of his work. The discovery sought on the basis of the OCME log should lead to specific corroboration of Dr. Kessler's statement.

statement should therefore now, given its trustworthiness, be admissible under Drayton.

The opinions of the autopsy offered are those of a qualified forensic pathologist who supervised Dr. Zane in 1995, and should be considered, together with the opinions of the four other pathologists set forth in affidavit.

"In a motion for a new trial based on new evidence, the defendant must show that the evidence is either 'newly discovered' or 'newly available'[] and that it 'casts real doubt' on the justice of the defendant's conviction. . . . New evidence will cast real doubt on the justice of the conviction if there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial. . . . The standard is not whether the verdict would have been different, but whether the evidence probably would have been a 'real factor' in the jury's deliberatons." Commonwealth v. Sullivan, 469 Mass. 340, 350-351 (2014)(citations omitted). "Evidence is newly discovered if it 'was unknown to the defendant or trial counsel and not reasonably discoverable at the time of trial' or at an earlier motion for a new trial." Commonwealth v. Ellis, 475 Mass. 459, 472 (2016)(citations omitted).

In the present case, resources and time for pretrial

preparation of a challenge to the autopsy were extremely limited. The time between indictment and the first day of trial was 125 days. Defendant was indigent and the trial judge denied a continuance shortly before trial began in August 1995 (App. T).

Moreover, the details of restrictions on Dr. Zane's performance of autopsies were inside information, withheld by the Office of Chief Medical Examiner [OCME], but not revealed to defendant Snell until Dr. Kessler gave the information in 2011. Dr. Zane's incompetence was also known within the OCME - and likely within the District Attorney's office - but not revealed to the public until a series of news reports in the years after the 1995 Snell trial. (App. I). The facts contained in the Kessler letter are clearly "newly discovered", rendering the rule of waiver inapplicable. The media reports are newly discovered, and the consulting pathologists retained by the defense after 2005 should be considered newly discovered as well.

(An additional, separate ground for ruling that there was no waiver is the fact that the information revealed by Dr. Kessler was exculpatory evidence, as discussed infra at pp. 50-61. Commonwealth v. Healy, 438 Mass. 672, 677-678 (2003).

Post-trial media reports. **A second set of facts constituting newly discovered evidence are presented in the media reports post-dating 1995, which tend to show that Dr. Zane**

was not competent to perform suspected homicide autopsies. (App. I) The facts set forth in those articles tend to corroborate Dr. Kessler's statement and, in themselves, cast doubt on the justice of the verdict. It may be surmised that what came to light in the media was the tip of the iceberg. The most damning development was the 2007 action by the Secretary of Public Safety suspending Dr. Zane from performing suspected homicide autopsies.

New pathologists' reports. A third set of facts negating the accuracy of the Elizabeth Snell autopsy is detailed in the experts' reports assembled by defense counsel in recent years and submitted herewith as exhibits. It was only with the aid of private funding (App. M) and a court order in December 2005 (App. O) that defense counsel and the experts could begin to explore the details of the autopsy. Cumulatively, the experts' reports establish conclusively that the errors and omissions in the autopsy left Dr. Zane's conclusion of asphyxiation without scientific basis.

The specific defects in the Zane autopsy, as detailed in the Young, Baden, Feigin, Kessler reports were thus not "reasonably discoverable" at the time of trial. Ellis, 475 Mass. at 472. Their discoverability was all but foreclosed by the limited time and resources of the defense. Dr. Katsas must not

have brought the many fatal, deficiencies in the autopsy to counsel's attention; surely counsel would have cross-examined with all information available. See Commonwealth v. Rosario, 477 Mass. 69, 79 n.13 (2017)[30], citing Commonwealth v. Buck, 64 Mass. App. 760, 764 (2005)("It would be a high hurdle indeed to expect counsel to continue to search for an alternative diagnosis where he reasonably could not be expected to know that one existed."). The incarcerated, indigent defendant has not been dilatory.

The "newly discovered" evidence from 2011, sourced to Dr. Kessler, in itself, is enough justify allowance of the Rule 30(b) motion. If introduced at trial, this evidence "would probably have been a real factor in the jury's deliberations." and "there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial." Commonwealth v. Cowels, 470 Mass. 607, 617 (2015),

30 "Although the . . . diagnosis was 'discoverable.' and therefore not 'newly discovered' evidence, we cannot say that defense counsel was ineffective for failing to discover it. He relied upon the expertise of others. . . in a field in which the attorney was not himself trained. It would be a high hurdle indeed to expect counsel to continue to search for an alternative diagnosis where he reasonably could not be expected to know that one existed." Commonwealth v. Rosario, 477 Mass. 69, 79 n.13 (2017). In the alternative, defendant argues, infra, that there was ineffective assistance of counsel in relying on Dr. Katsas and not seeking funds sooner for a second pathologist. Moreover, another part of the "latticework" is the withholding of exculpatory evidence, as detailed in 2011 by Dr. Kessler, further excusing pre-trial lack of scientific evidence and opinion to rebut Dr. Zane.

quoting Commonwealth v. Grace, 397 Mass. 303, 306 (1986); accord, Commonwealth v. Ellis, 475 Mass. 459, 476-477 (2016) (issue is whether "newly discovered evidence 'casts real doubt on the justice of the conviction.' . . . '[t]he motion judge decides not whether the verdict would have been different, but rather whether the new evidence would probably have been a real factor in the jury's deliberations.'")(quoting Cowels and Grace).

However, the entire picture sketched by Dr. Kessler's revelations of Dr. Zane's incompetence and resulting restrictions on his work is corroborated and given further detail by the Young, Baden, Feigin and Kessler reports establishing specific errors and omissions in the Elizabeth Snell autopsy. This is a case where "newly discovered" evidence must be considered with related evidence, to properly judge the "confluence of factors". Commonwealth v. Rosario, 477 Mass. 69, 76, 79 n.13 (2017). In other words, if the Kessler information, in itself, is deemed insufficient to justify a new trial, it must also be considered with the four other pathologists' reports, as well as the media reports, in determining that the new Kessler information warrants a new trial. Id. at 76.

Discretionary waiver. Lastly, a defendant who has previously

filed an unsuccessful new trial motion may be relieved of waiver in the exercise of the motion judge's discretion. Mass.R.Crim.P. 30(c)(2). In the case at bar, the cumulative effect of the errors identified in the present new trial motion cast serious doubt on the justice of the verdict and call for an exercise of discretion ordering a new trial. See also House v. Bell, 547 U.S. 518, 536-537 (2006)(waiver in federal habeas corpus proceeding inapplicable where "in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'")(citation omitted)

Scientific Errors and Omissions in Dr. Zane's conduct of the autopsy presented a substantial risk of a miscarriage of justice. If waiver does apply, defendant nonetheless has a right to consideration of his motion:

> "when the error creates 'a substantial risk of a miscarriage of justice.' Commonwealth v. Freeman, 352 Mass. 556, 564 (1967). This is actually not an exception, but a default standard of review. In all cases where a defendant fails to preserve his claim for review we must still grant relief when 'we are left with uncertainty that the defendant's guilt has been fairly adjudicated.' Commonwealth v. Azar, 435 Mass. 675, 687 (2002), quoting Commonwealth v. Chase, 433 Mass. 293, 299 (2001)." Commonwealth v. Randolph, 438 Mass. 290, 294-295 (2002).

In the present case, defendant Snell has made a strong

showing that guilt was not fairly adjudicated. The expert opinions submitted in support of the present motion show that the Zane autopsy was riddled with errors and omissions. His errors fell into two categories: (1) Clearly erroneous identification of injuries associated with asphyxiation; and (2) Failure to follow accepted standards of forensic pathology in testing for factors which would have supported a finding of a death by natural causes. No confidence can be placed in the jury's verdict after such critical deconstruction of the autopsy.

The experts consulted by defendant destroyed confidence in the autopsy, in general terms and in specific terms.

General opinions. Drs. Feigin, Young and Baden gave opinions to a degree of medical certainty that the cause of death was not asphyxiation. (summarized, supra, pp. 13-14) Dr. Kessler provided information that the autopsy was fundamentally unreliable because Dr. Zane's supervisors had deemed him not competent to perform a suspected homicide autopsy without supervision, but he performed the Elizabeth Snell autopsy on his own, without the mandated supervision; and he did the autopsy at Pocasset, without the needed technology of the Boston facility. Moreover, it was not consistent with accepted standards of pathology to give a final opinion without the histology slides

which were not available until up to two weeks later. (App. G) (Indeed, the slides were of tissue from multiple persons (Friedlander, App. D)) It was also incorrect for Dr. Zane to testify that asphyxia was a diagnosis of exclusion; smothering will always leave evidence of struggle on face and body. (supra, p. 24).

Specific opinions. The experts consulted by defendant also rebutted Dr. Zane's findings and added many expert observations showing lack of asphyxiation and serious omissions in the list of inquiries which a competent pathologist should have undertaken.

Dr. Zane's opinion of asphyxiation was based only on (1) Seventeen superficial injuries to the body, eight of which he analyzed as being inflicted around that time of death; (2) petechiae inside the throat and on one lung; (3) a wide estimate of the time of death, which gave relevance to the time of 6:30 A.M. when Mr. Rozen claimed to have seen defendant drive away from the house; (3) a bruise on the ankle, dramatized by a hypothetical question about consistency with a large male holding the ankle and head down; (4) partial exclusion of natural causes of death, including a flawed reliance on microscopic slides of tissue taken from more than one body. (5) a "very good chance" that the body was moved after death.

(supra, pp. 4-8)

Defendant's experts have rebutted Dr. Zane in the following particulars:

- The observed injuries to the face and body were minor and consistent with normal daily activities. Dr. Zane's microscopic examination of eight of the injuries was reviewed by four pathologists and, in each instance, his finding that the injury occurred near the time of death was refuted. (supra, pp. 14-16)

- The absence of any meaningful blood[31] or other secretions observed on the pillows, bedding or body, showed that the observed injuries were not inflicted during a smothering when the heart would have been pumping and leaving traces of fluids from injuries. In this regard, the State Police Laboratory examined the pillows and bedding and but did not identify secretions of mucous and other fluids as would almost always accompany a smothering. (supra, pp. 16-18)

- Dr. Zane was wrong in finding the position of the body and lividity as proof of smothering; they were consistent with a natural death. (supra, pp. 23-24)

31 There was a faded "minimal" bloodstain on a pillow found on the marital bed. The other pillow, without a bloodstain, was under the deceased's face.

- The absence of petechiae in the eyes or both lungs tended to negate asphyxiation, but this was overlooked by Dr. Zane. (supra, p. 19)
- Petechiae on a single lung or the vocal chords, relied on by Dr. Zane as evidence of asphyxiation, were not indicative of asphyxiation. In fact, Dr. Zane was incorrect in observing petechiae on the vocal chords. Moreover, the absence of trauma in this area tended to rule out asphyxiation. (supra, pp. 19-20)
- There were no compression injuries to the nose, mouth, or neck, which would be expected in case of asphyxiation. There was no evidence of mouth trauma or defensive injuries which would be expected in a smothering. (supra, pp. 20-21)
- **The presence of undigested dinner food in the deceased's stomach puts death in the late evening/midnight range and contradicted Dr. Zane's time of death estimate as including the time the following morning when Mr. Rozen claimed to have seen defendant at the house. (supra, p. 21)**
- **There was no cyanosis, a bluish tint to the skin, a classic finding in asphyxia deaths. (supra, p. 18)**

- *Edema in the lungs was absent; smothering would have produced significant edema. Lack of edema is consistent with sudden heart failure.* (supra, p. 18)

- *The Zane findings of no heart or liver disease were based in part on tissue slides which were from different persons.* (supra, p. 25)

- *The heart tissue examination by Dr. Zane was woefully inadequate and the deceased's medical history was not investigated, among other medical shortcomings, rendering the exclusion of heart disease incompetent.* (supra, pp. 25-26)

- The lung tissue samples contained no bronchioles; Dr. Zane therefore did not competently exclude asthma as a possible factor. (supra, p. 26)

- The failure to test the inhaler or examine the decedent's medical history left sudden death of an asthmatic as a possibility. As Dr. Zane acknowledged, the inhaler contained epinephrine, which can trigger a heart stoppage.[32] Hospital records, not consulted by Dr. Zane, on the other hand, show negative tests for lung

[32] Shortly before trial, media reports brought to the public's attention the danger of sudden deaths from epinephrine inhalers. (App. W)

congestion, [33] (App. V)(supra, pp. 22-23).

- Drs. Feigin, Baden and Young opined to a reasonable degree of medical certainty that there were no findings to show that death was caused by asphyxiation. Dr. Zane's testimony nowhere stated that his opinion was based on a reasonable degree of medical certainty, or any degree of certainty. (supra, pp. 13-14)

In light of the foregoing evidence presented by the defendant, there is a substantial risk of a miscarriage of justice because there was "*a serious doubt whether the result of the trial might have been different had the error not been made.*" (italics added). Commonwealth v. Brescia, 471 Mass. 381, 389 (2015), quoting Commonwealth v. Randolph, 438 Mass. 290, 297 (2002). The problem lies not only with the little, scientifically incorrect, autopsy evidence heard by the jury, but also with the devastating expert evidence which the jury did

---

33 Unmentioned at trial was a prescription for Macrobid, (App. S) an antibiotic, evidently used for a urinary tract infection. Its common side effects include chest pain, ***shortness of breath*** and troubled breathing. www.drugs.com/sfx/macrobid-side-effects.html. According to the FDA's online fact sheet for Macrobid, "acute, subacute, or chronic pulmonary reactions have been observed in patients treated with nitrofurantoin. . . . Reports have cited pulmonary reactions as a contributing cause of death." (emphasis added) (App. S, p. 5)
https://www.accessdata.fda.gov/drugsatfda_docs/label/2009/020064s019lbl.pdf

not hear. Had the jury known Dr. Kessler's revelations: that Dr. Zane was not considered competent by his superiors and was forbidden to undertake such an autopsy unsupervised, the result would have been different; that secretions resulting from a smothering, and other trace evidence (such as fingernail polish chips) were crucial evidence proving or disproving smothering, and that Dr. Zane was grossly negligent in not bringing the body to the OCME state of the art facility in Boston, the jury verdict would been different. And, had the jury been aware of the many specific errors and omissions in Dr. Zane's findings, as detailed in the expert opinions submitted with this motion, the outcome would have been different.

In this case, the risk of a miscarriage of justice extends to such predicates as the Grand Jury indictment. Because the Grand Jury was not made aware of the illegitimacy of the conduct of the autopsy as revealed by Dr. Kessler, the indictment should be deemed void. See Commonwealth v. McGahee, 393 Mass. 743, 746 (1985) ("When the prosecutor possesses evidence which would greatly undermine the credibility of evidence likely to affect the grand jury's decision to indict, the prosecutor must alert the grand jury to the existence of such evidence.") Further, the Kessler report and other pathologists' reports so undermined the scientific reliability of the autopsy that the trial court,

acting as "gatekeeper" for expert opinion, would have likely excluded his testimony since Dr. Zane was not "qualified" to offer it. See, e.g., Commonwealth v. Polk 462 Mass. 23, 31 (2012).

The prosecution suppressed exculpatory evidence which casts doubt on the justice of the verdict.

A new trial is warranted, irrespective of Rule 30(c)(2)'s reference to waiver, or the foregoing argument of a substantial risk of a miscarriage of justice, because significant exculpatory evidence was withheld by the prosecution at the time of trial. Late-discovered exculpatory evidence, in this case from 2011, is "newly discovered" and cognizable under Rule 30(c)(2). See Healy, 438 Mass. at 678-679. Under Brady v. Maryland, 373 U.S. 83 (1963), and Commonwealth v. Tucceri, 412 Mass. 401, 413 n.11 (1992), the prosecution's failure to disclose violates the Fifth Amendment[34] and Massachusetts common law standards more favorable to a defendant. A new trial is called for if the prejudice from non-disclosure of the exculpatory evidence meets the standards of Brady or Tucceri.

There should be no doubt that the information in the Kessler

34 The suppression of exculpatory evidence in this case also violated defendant's Sixth Amendment right to confront the witness against him, Dr. Zane.

report was exculpatory. Exculpatory "is not a narrow term connoting alibi or other complete proof of innocence, . . . but rather comprehends all evidence 'which tends to "negate the guilt of the accused" . . . or, stated affirmatively, "supporting the innocence of the defendant." ' " . . . Favorable evidence "need not be dispositive evidence." Commonwealth v. Murray, 461 Mass. 10, 19 (2011)(citations omitted).

The exculpatory information referenced in the Kessler statement was known to Dr. Zane and to his superiors in the Office of Chief Medical Examiner before and after the trial in this case. Dr. Zane had been employed on the Cape as an assistant medical examiner since 1987. His career-spanning shortcomings must have been known within the District Attorney's office which regularly relied on him and his colleagues in preparing cases. It would be disingenuous for the Commonwealth to argue that the exculpatory nature of his shortcomings was not apparent. "Evidence tending to impeach an expert witness for incompetence or lack of reliability falls within the ambit of the Commonwealth's obligations under Brady." Commonwealth v. Sullivan, __ Mass. __ , slip op. at 22-23 (11/16/2017) (criminalist's failure to pass proficiency tests regarding analysis at issue was exculpatory and admissible). And, as in Sullivan, the suppression of exculpatory evidence also deprived

the defense of cross-examination establishing that Dr. Zane misstated his employment history. Nonetheless, no disclosure of Dr. Zane's incompetence or the ban on his performing autopsied unsupervised was made to the defense.

As noted, defendant Snell relies on the Kessler statement as admissible evidence, as corroborated by the post-trial revelation of Dr. Zane's incompetence, culminating in his 2007 suspension from conducting autopsies. Defendant also seeks, in the accompanying motion for discovery, material from the OCME files insofar as it relates to the matters disclosed by Dr. Kessler. Evidence in the OCME's file is held or known by an agent of the prosecution. It was, and is, subject to the same duty of disclosure as if it were in the prosecutor's file. Commonwealth v. Woodard, 427 Mass. 659, 679 (1998); accord Commonwealth v. Scott, 467 Mass. 336, 349-350 (2014); Commonwealth v Martin, 427 Mass. 816, 823-824 (1998)(prosecution has "duty of inquiry"). Ultimately, Dr. Zane himself has personal knowledge of the restrictions placed on him by his superiors. (Dr. Kessler and the other superior mentioned by him, James Weiner, M.D., are deceased).

Defendant's claim that exculpatory evidence was suppressed is twofold. First, the prosecution was duty bound to disclose all exculpatory information to the defense, sua sponte.

Second, there were discovery requests and motions filed pretrial by defendant which sought information about "laboratory procedures" and expert credentials. Despite this clear focus, the prosecution failed to disclose the exculpatory information referenced by Dr. Kessler. Different standards of review are called for by each aspect of the claims concerning exculpatory evidence. See generally, McCambridge v. Hall, 303 F.3d 24, 47-49 (1st Cir. 2002)(en banc)(dissenting opinion).

First, in the absence of a specific request by defendant, the prosecution is required to disclose exculpatory evidence in its possession. In these circumstances: "To establish a Brady violation, a defendant must show that (1) material information was in the possession of the prosecutor or 'those police who are participants in the investigation and presentation of the case,' . . .; (2) the information tended to exculpate him; and (3) the prosecutor failed to disclose the evidence." Commonwealth v. Caillot, 454 Mass. 245, 261-262 (2009)(citation omitted). Simply put, the government violates the Constitution's Due Process Clause "if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." Turner v. United States, 582 U.S. ___, slip op. at 1 (June 22, 2017)(emphasis in original), quoting Smith v. Cain, 565 U.S. 73, 75 (2012). Evidence is "favorable to the accused

either because it is exculpatory, or because it is impeaching." Strickler v. Greene, 527 U.S. 263, 281-282 (1999). The test under Brady is whether the "withheld evidence 'in the context of the entire record . . . [presents] a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'" Turner, supra, slip. op at 11, quoting Cone v. Bell, 556 U.S. 449, 470 (2009)(citation omitted).

> "Due process of law requires that the government disclose to a criminal defendant favorable evidence in its possession that could materially aid the defense against the pending charges." Commonwealth v. Tucceri, 412 Mass. 401, 404-405 (1992), citing Brady v. Maryland, 373 U.S. 83, 87 (1963). The public's faith in the integrity of our criminal justice system could not be sustained otherwise. 'Favorable evidence' need not be dispositive evidence. Evidence may be favorable or exculpatory, and thus required to be disclosed, 'although it is not absolutely destructive of the Commonwealth's case or highly demonstrative of the defendant's innocence.' Commonwealth v. Ellison, 376 Mass. 1, 22 (1978). If evidence 'provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness,' that evidence should reach the defendant's hands before trial, if at all possible. Id." Commonwealth v. Daniels, 445 Mass. 392, 401-402 (2005).

See also Kyles v. Whitney, 514 U.S. 419, 437 (1995) ("the individual prosecutor has a duty to learn of any favorable

*evidence known to the others acting on the government's behalf, including the police. But whether the prosecutor succeeds or fails in meeting this obligation ((whether, that is, a failure to disclose is in good faith or bad faith . . .)), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."); Mass.R.Prof.Conduct 3.8(d) (prosecutor must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused . . . ."); Commonwealth v. Ware, 471 Mass. 85, 95 (2015) ("It is well established that the Commonwealth has a duty to learn of and disclose to a defendant any exculpatory evidence that is 'held by agents of the prosecution team.'") (citation omitted).

The Commonwealth's duty existed before trial after trial. Before trial, defense counsel in this case, on May 25, 1995, filed a discovery motion for disclosure regarding "scientific evidence expert witnesses" (Docket #24; App. X), which put the prosecution on notice that information concerning Dr. Zane's qualifications and methodology were sought. Specifically, the motion filed on May 25, 1995 sought

> "copies of the results, reports, laboratory notes, laboratory procedures and clinical notes, of all scientific tests or experiments made in connection

with this matter and to provide copies of the curriculum vitae of all experts which the government intends to call . . . " (emphasis added) (App. X)

Three subsequent pretrial motions to compel this discovery were filed and allowed. (Docket ##47, 51, 66). Shortly before trial, Judge Travers held hearing on a motion for a continuance and defense complaints that discovery had not been completed. Thereafter, the judge entered a written decision on the motions, noting that it appeared that no discovery was outstanding. (App. T) The inference is inescapable that the prosecution had purported to comply with disclosure of the material in paragraph 4, including the "laboratory procedures", as well as the "curriculum vitae"[35] information requested in the original motion. However, the prosecution never disclosed the restrictions on Dr. Zane's suspected homicide autopsies, including his need to be supervised while conducting them, and the requirement that close contact suspected homicides be taken to the technologically advanced Boston facility for autopsy. Nor did it make known any information disclosing the shortcomings in Dr. Zane's experience at the Maryland Medical Examiner's office, as disclosed in the Kessler report and Krowski affidavit, or any other negative professional

35 The date stamp on the Zane Curriculum Vitae, "Aug-30-95", indicates that it was faxed on the morning of Dr. Zane's testimony. (App. A).

qualifications information known to the prosecution or OCME. An evidentiary hearing on the present motion is needed to bring to light the full picture of Dr. Zane's known shortcomings. The prosecution violated the rule that "once the Commonwealth has notice that the defendant seeks specific favorable information in the its possession, it must examine the material and furnish that information to the defense if it is favorable." Daniels, 445 Mass. at 402.

The prosecution's duty is ongoing after trial. "[T]he Commonwealth has a continuing duty to review the material and to disclose to the defendant any 'favorable evidence in its possession that could materially aid the defense against the pending charges.'" Commonwealth v. Daniels, 445 Mass. 392, 410 (2005), quoting Commonwealth v. Tucceri, 412 Mass. 401, 405 (1992). Commonwealth v. Ware, 471 Mass. at 95. (Amherst drug lab scandal). Defendant Snell is entitled to such disclosure.

From 1995 to the present, the prosecution and OCME have continuously ignored this duty with respect to the exculpatory information revealed by Dr. Kessler:

* The media reports set out in the Appendix (App. I) document a series of Dr. Zane's incompetent autopsies, culminating in his suspension in 2007 from conducting homicide autopsies show continuing notice of incompetence which called

SUPERIOR COURT
SS
7
Clerk

for prosecutorial scrutiny of Dr. Zane's likely bunging of the autopsy in this case.

* Defendant Snell, pro se, wrote in 1998 to the prosecutor requesting a copy of discovery. The prosecutor responded that he had turned over everything to trial counsel. (App N) He disclosed no exculpatory evidence, failing again to fulfill his ongoing duty.

* In 2005, the Court ordered discovery of various details concerning the autopsy. (App. O) OCME responded, but not with any exculpatory evidence.

* In 2013, Mr. Snell wrote to the OCME requesting information from the file concerning Dr. Zane's tenure there. OCME responded with partial disclosure of his file, but withheld assertedly privileged information. (App. Q) Again, no exculpatory information about restrictions on his homicide autopsy work was revealed.

* In 2012, counsel for Emory Snell filed a "Motion for Enlargement of 2005 Discovery Order to Include Personnel File. The Commonwealth filed an opposition. (App. P) The motion was not acted on. The Commonwealth, on its own, failed to disclose any exculpatory evidence.

The Commonwealth, before trial and after trial, has suppressed exculpatory evidence as documented by Dr. Kessler,

together with whatever else of an exculpatory nature concerning Dr. Zane may be known to OCME. Ordinarily, in the case of undisclosed exculpatory evidence, defendant Snell would need show only a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Turner, supra, 582 U.S. __ , slip op. at 11.

However, an even more favorable standard of review should be accorded where, as here, specific requests have repeatedly been made. In these circumstances, the Commonwealth's withholding of the exculpatory evidence disclosed by the Kessler statement entitles defendant Snell to a more lenient standard of review than that in the ordinary case of exculpatory evidence not specifically requested:

> "When the Commonwealth withholds evidence that has been specifically requested, we review the matter under a standard for allowing a motion for a new trial that is 'more favorable to the defendant' than if the request had been general 'in order to motivate prosecutors to be alert to defendants' rights to disclosure.' . . . Because defense counsel is more likely to treat the prosecutor's failure to disclose specifically requested material as an implied representation that the evidence does not exist and make legal and strategic decisions accordingly, when the Commonwealth has not disclosed specifically requested favorable evidence, the defendant "need only demonstrate that a substantial basis exists for claiming prejudice from the nondisclosure." Daniels, 445 Mass. at 412, quoting Tucceri, 412 Mass.at 407.

See also Commonwealth v. Martin, 427 Mass. 816, 823-824 (1998);

CLERK'S OFFICE
7
Clerk

Commonwealth v. Ellison, 376 Mass. 1, 24-25 (1978)(noting that United States v. Agurs, 427 U.S. 97, 112 (1976) requires that "the reviewing judge must set aside the verdict and judgment unless his `conviction is sure that the error did not influence the jury, or had but very slight effect.'")

Thus under the ordinary standard set out in Turner, supra, slip op. at 11, the defense need show the "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." (citation omitted). Under Tucceri, 412 Mass. at 412, which applies here, defendant need show only "a substantial basis for claiming prejudice from the nondisclosure." See also Agurs, quoted supra. Given the information in the Kessler statement, seriously discrediting Dr. Zane's competence and the conduct of the autopsy in this case, both tests for prejudice are satisfied.

If the jury had known the substance of Dr. Kessler's revelations about Dr. Zane's incompetence and restrictions placed on his conduct of suspected homicide autopsies, the reliability of the entire autopsy in this case would have been destroyed. The reasonable doubt thus created would have led to a verdict of not guilty. At the very least, there is a "reasonable probability" of such an outcome. "The judge does not decide whether the verdict would have been different but

rather 'whether the new evidence would probably have been a real factor in the jury's deliberations.'" Murray, 461 Mass. at 21 (citations omitted). The Court cannot be "sure that the error did not influence the jury, or had but very slight effect.'" Agurs, 427 U.S. At 112.

Ineffective assistance of counsel's expert and of counsel.

Given Dr. Katsas's long experience as an OCME medical examiner, it appears that defense counsel was not ineffective in *hiring* him. However, in light of the detailed opinions of five other pathologists submitted with this Rule 30(b) motion, it is inescapable that Dr. Katsas was ineffective in that he did not identify many critical errors and omissions in the autopsy which should have been brought out on cross-examination of Dr. Zane. Defendant cannot at this time establish by affidavit what counsel did or did not do in dealing with Dr. Katsas's lack of assistance. The matter appears to have been brought up in the judge's lobby about ten days before trial began.[36]

Irrespective of counsel's role, Dr. Katsas's failure to

36 See Shea Affidavit (App. J), recounting telephone statement of lead counsel Albert Bielitz that he was dissatisfied with Dr. Katsas and requested funds for a second forensic pathologist in a lobby conference shortly before trial. Judge Travers's "Pretrial Decision on Pending Motions" stated that a lobby conference had been held to discuss matters relating to the defense trial strategy. (App. T, p. 00125) And, Attorney Bloomenthal who cross-examined Dr. Zane declined to provide counsel with an affidavit. (App. J).

supply the defense with the numerous errors and omissions in the autopsy, as disclosed by the post-conviction experts retained by defendant, constituted a substantial risk of a miscarriage of justice. Moreover, counsel should have recognized early on that Dr. Katsas was not sufficiently helpful and sought funds earlier for a second pathologist. On the present state of the record, Attorney Sandra Bloomenthal simply proceeded in reliance on Dr. Katsas alone for very limited cross-examination and without seeking a pathologist who would testify for the defense. A competent defense attorney should not have proceeded on this basis. The post-conviction experts show that there were numerous avenues which a reasonably competent attorney should have followed. She should have made an effort early on to replace Dr. Katsas and find a pathologist who would testify.

There was both "ineffective assistance of expert" in this case, as well as ineffective assistance of counsel[37] who continued to rely on him. It is unnecessary to determine the exact place in the "latticework" where Dr. Katsas's failure to aid the defense would fit. The guiding principle was set forth in Commonwealth v. Epps, 474 Mass. 743, 767 (2016):

"[O]ur touchstone must be to do justice, and that

37 Defendant is raising his ineffective assistance of counsel claims under the Sixth Amendment, as well as Article 12. Strickland v. Washington, 466 U.S. 668 (1984); Commonwealth v. Saferian, 366 Mass. 89 (1974).

requires us to order a new trial where there is a substantial risk of a miscarriage of justice because a defendant was deprived of a substantial defense, regardless of whether the source of the deprivation is counsel's performance alone, or the inability to make use of relevant new research findings alone, or the confluence of the two."

Ineffective Assistance of Counsel. In addition to the failure to develop evidence to seriously challenge the Zane autopsy findings, counsel was deficient in the following particulars.

*Mr. Rozen testified that he saw defendant's truck parked in the driveway of the home at a few minutes before 6:30 a.m. on March 17. The truck was facing the street. A few minutes later, Rozen was walking in the direction of the home again and heard the truck start and saw defendant Snell drive it away. It turned left on Putnam Avenue, (Tr. 6/60-66; 8/28/95) which was in a direction away from Route 28 and Hyannis. Trial counsel failed to impeach this testimony in the following particulars:

* When police arrested Emory Snell the previous evening, the truck was parked facing the house, not the street. (Tr. 241, 276) Mr. Snell made bail and left the police station in Hyannis and checked into a nearby motel ten minutes later. (Grand Jury p. 30) Prior to 7 A.M., he called the front desk of the motel to check out. (Grand Jury, pp. 30-31)

according to Trooper Burke at the Grand Jury, Mr. Rozen had told him that he observed the truck facing out of the driveway between 6:30 and 6:45 a.m. Defense counsel did not call Trooper Burke to testify to this discrepancy in the time in Mr. Rozen's account. (Tr. 42)

Defense counsel did not call witnesses to testify to these times and events. Instead of arguing in reliance on the pre-7:00 a.m. checkout call, counsel mentioned only a computer form showing checkout an hour later. (Tr. 1169). Nor did counsel argue that the left turn onto Putnam Avenue was inconsistent with a check-out at a Hyannis motel since defendant would have been driving in an opposite direction - and would not have been able to drive to the Hyannis motel for the pre-7 a.m. checkout call.

* There was no out-of-court or in-court identification by Mr. Rozen of Emory Snell as the driver of the truck. Mr. Rozen identified a photo of Emory Snell in court. (6/61) Counsel failed to challenge Mr. Rozen's identification of the photo or testimonial reference to Mr. Snell as the driver.

* Defense counsel called Norm MacDonald, a meteorologist to testify that the conditions on the Cape were cloudy with rain on the morning of March 17 (Tr. 1081-1082), which contradicted Mr. Rozen's testimony that the sun was coming out and it was a

clear day (Tr. 6/89-90). However, Mr. MacDonald was given data on the day before trial by defense counsel, and his testimony was not conclusive as to the local weather near the home. The prosecutor was able to undermine the reliability of his testimony on cross-examination, to the effect that a local spot of clear weather was possible. (Tr. 1080, 1085-1102). The affidavit of meteorologist Robert Lautzenheiser (App. L) establishes conclusively that the Cape was rainy overall since a northeaster dominated the weather that day. "Upon expert evaluation of all related weather data, it is my expert opinion on March 17, 1995, specifically at 6:30 A.M. that it could not be 'clear and sunny,' as during that time a Nor'easter was blanketing all of the Cape and Islands." (App. L) Counsel's belated reliance on Norm MacDonald as an expert witness was therefore deficient.

There was no tactical reason for counsel to fail to develop the foregoing points challenging Mr. Rozen's testimony. The question is the degree of prejudice.

Had defense counsel adduced the foregoing evidence to rebut Mr. Rozen's observations, his placing of defendant at the house at 6:30 a.m would have been rendered incredible. The Rozen testimony was relied on by the prosecution as an important element of corroboration of the homicide theory. The failure

COURT
SS
2017
Clerk

to undermine the Rozen testimony - alone or together with the failure to competently challenge the Zane autopsy testimony - amounted to ineffective assistance of counsel because the errors create "serious doubt whether the jury verdict would have been the same had the defense been presented." Commonwealth v. Millien, 474 Mass. at 432. Strickland v. Washington, supra.

Actual Innocence. Finally, the complete lack of evidence of a homicide, after the Zane autopsy has been analyzed and discarded, establishes the conclusion of Emory Snell's "actual innocence", an additional ground for relief. House v. Bell, 547 U,S. 518 (2006); Schlup v. Delo, 513 U.S. 298 (1995).

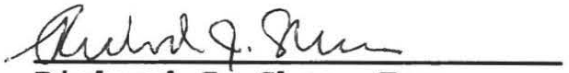
Evidentiary hearing. Defendant Snell here has raised a "substantial issue" supported by "substantial evidence". He therefore should be accorded an evidentiary hearing. Commonwealth v. Muniur M., 467 Mass. 1010, 1011-1012 (2014); see Commonwealth v. Denis, 442 Mass. 617, 629 (2004) ("Although the motions and supporting materials filed by a defendant need not prove the issue raised therein, they must at least contain sufficient credible information to cast doubt on the issue."). Upon the granting of a hearing, defendant will file further motions for funds for investigation or discovery, as needed to present expert medical and other evidence at the hearing.

Finally. After defendant, for the first time, has access to the exculpatory evidence from the OCME, it is anticipated that the evidence at the hearing will support dismissal of the indictment with prejudice, both because the prosecution and OCME knowingly suppressed exculpatory evidence and because, after the passage of 22 years, defendant's ability to defend is severely compromised.

Conclusion

It is urged that the case be set down for an evidentiary hearing and the new trial motion be granted.

Respectfully submitted,
EMORY G. SNELL, JR.



By: Richard J. Shea, Esq.
398 Columbus Ave., # 194
Boston, MA 02116
671-909-4321
BBO 456300